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NO. 82-397

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

State Bar of Texas,

Petitioner,

v.

Charles Ben Howell,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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RESPONDENT'S QUESTION

Did the Court of Appeals not place its decision on such a narrow ground that Supreme Court review is wholly unwarranted?

ANSWER TO PETITIONER'S QUESTIONS

One: The Fifth Circuit held that in the ordinary instance, an attorney who has been disciplined may *not* have §1983 review of federal questions even after the state proceeding is complete. The ruling was error, but it was harmless in that the Court held the present action to be a special case.

Two: An error of a federal court would constitute a deprivation of the rights of the individual in the same manner and to the same extent as if the deprivation were procured by the state's attorney or the state court. Respondent has presented no distinguishing authority. The answer must be "No."

Three: Respondent's question is not subject to an abstract answer. While a §1983 action is not wholly exempt from *res judicata* and full faith, the rigorous application of those doctrines would seriously impair, if not stifle the principle that a litigant is entitled to a federal forum for his federal questions. The relationships and the rights asserted must be analyzed in each case. In the context of the present case, the answer is clearly "No."

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BRIEF IN OPPOSITION TO CERTIORARI

Respondent Charles Ben Howell presents herewith his reasons why certiorari should not be granted in this case:

OPINION BELOW

The opinion of the Court of Appeals, 674 F.2d 1027 (A. 3) and the District Court's letter dated July 24, 1980 advising the basis of its decision (A. 12) are correctly reproduced in petitioner's appendix.[1] The petitioner has not

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[1]Respondent will employ the following abbreviations in referring to the record: (A.), Appendix attached to the Petition For Certiorari. (Ptn.), Petition For Writ of Certiorari.

Unless otherwise indicated, all emphasis has been supplied.

included the judgment of the Court of Appeals in the appendix.

JURISDICTION

The jurisdictional statement submitted by petitioner is correct.

STATUTORY PROVISION INVOLVED

42 USC, §1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

It is plain that petitioner has made an effort to state the case as favorably to its position as possible, but respondent will not burden the Court with a full restatement of the case in that petitioner's overstatement is not material to the question to be decided.

REASONS FOR DENYING THE WRIT

(1)

The Fifth Circuit laid its decision on the narrowest possible grounds. The principal grounds urged by respondent were rejected. The rejection was harmless because the Court nonetheless found the District Court's dismissal order to be erroneous and remanded.

Inasmuch as the District Court by its order induced respondent to reserve his federal claims for federal litigation, the Fifth Circuit, grounding its order both on fundamental fairness and legal precedent, decided that the federal court must give to respondent the hearing that was promised to him.

The Supreme Court is a court of discretionary jurisdiction. What "special and important reasons" have been advanced by petitioner for review on certiorari? It is not conceivable that a circumstance comparable to the one shown will occur save in the rarest instance. Petitioner has not explained why the Supreme Court should hear argument in this case. To the contrary it is stated:

> "This is not itself a case in which the public interest would be immediately and seriously endangered by further litigation in federal court * * *" (Ptn. 14).

The petition concludes by stating:

> "[Petitioner] cannot know how the Fifth Circuit's exceptions will be used in the future. * * * We fear these exceptions will be applied beyond the facts of this case" (Ptn. 19).

As we read the petition, petitioner has conceded that it has no reason for opposing this §1983 action except out of fear that the right to fede al review in state attorney discipline cases will be expanded in the future. It is a principle of constitutional law that the courts, particularly the Supreme Court, will not decide constitutional principles unless they are squarely and necessarily presented. This case is not a proper vehicle for determining whether or not §1983 review is available as a general proposition in attorney discipline cases. That question must abide another day when it is raised in a context not involving the narrow, special considerations here involved.

(2)

Although the grounds of the Court's ruling are narrow, they are well supported. *England v. Exrs.*, 375 US 411 (64) is a virtual white horse case. It involves the licensing and regulation of professional groups by the state. A group of chiropractors there brought suit in federal court challenging the regulatory plan to which they were being subjected. Obviously, they anticipated disciplinary action. The United States District Court held the professionals there involved should first seek state court construction of the regulatory scheme. The Supreme Court held that subsequent federal review could not be denied on grounds of res judicata when the professionals returned to federal court because they were only doing what they were told that they must do as a prerequisite to obtaining federal relief.

The case at bar fits the *England* precedent hand in glove. Petitioner has argued *England* to be inapplicable because those plaintiffs were supposedly *ordered* to go to

the state court, whereas, as it is urged, the federal district court below, gave no order whatever.

The attempted distinction does not exist. No mandatory order was ever passed requiring the *England* professionals to engage in any affirmative action whatever. That is to say, there was never an order in the nature of a mandatory injunction wherein a party is directed to remove his encroachment from the opposing party's property forthwith on pain of fine and imprisonment for contempt. The federal district court below spoke conditionally only and the federal district court in *England* spoke in the identical manner: "You may not have federal relief until the matter complained of has been litigated in state court." The notion that the *England* professionals were directly ordered to do anything is incomprehensible. The cases are identical.

The Due Process Clause is a safeguard against all conceivable types of official misconduct. Inasmuch as those who act on behalf of petitioner are state officers, they are subject to the limitations of the Due Process Clause of the *Fourteenth Amendment* and the judges of the state courts are likewise subject to that clause. At the same time, there is a Due Process Clause within the *Fifth Amendment* which operates against federal officers, including federal judges. Inasmuch as the federal court represented to respondent that he might have federal review of his federal questions as long as they were reserved and withheld in the pending state proceeding, it would be a direct deprival of due process to allow the federal district court to reverse its ruling after the time to present federal questions to the state court was past. A litigant is entitled to rely upon the procedural rulings of a federal court. The ruling, in effect,

became the law of the case, and applies to this particular case, whether or not it is sound as a general proposition.

Before this Court, petitioner has not drawn any significant distinction between *Howell* and *England*. To the contrary, petitioner would prefer to ignore *England* and hope that it will be overlooked.

Contrariwise, respondent urges that *England* is controlling. *England* has been cited by the Supreme Court on many subsequent occasions. Petitioner appears to contend that *England* was overruled or limited by *Allen v. McCurry* (Ptn. 16-17). The Supreme Court expressly denied as much and stated:

> "Where a plaintiff properly invokes federal court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction. * * * Abstention may serve only to postpone, rather than to abdicate jurisdiction, since its purpose is to determine whether resolution of the federal question is even necessary." *Id.*, n. 17.

(3)

It is contended that the case at bar conflicts with the decisions of other courts of appeal concerning the application of *res judicata*. No conflict with a decision of the Supreme Court is alleged. Whether the decision would conflict with the ruling of another court of appeals on the same facts is problematical at most. For certain, the petition does not cite any case wherein the fact situation was at all similar. In fact, most of the authorities cited are not even professional discipline cases.

The reservation rule contained in *England* has no application unless the affected individual is (a) forced to litigate against his will (b) in a state court (c) against a state officer or authority. In *Scoggin* and *Spence* (Ptn. 13) it appears that the federal plaintiffs had each previously selected the state forum. *Robbins* and *Blankner* (Ptn. 13) respectively involve child custody and land condemnation. They are too far on their facts to be of assistance in determining the rule applicable to professional discipline cases in general or disbarment cases in particular.

Coogan (Ptn. 12) is the only professional license case other than *England* cited under petitioner's first point. That case has been effectively overruled by the subsequent Sixth Circuit case of *Getty v. Reed*, discussed below. Contrary to the assertion made in point one, petitioner has not cited a single case to indicate that the *Howell* case, on its peculiar facts, would be differently decided in any other circuit.

(4)

As we read the petition, the essential position of petitioner is that there may be no §1983 review of state professional license litigation. The argument is sweeping and monolithic. No exceptions are stated or recognized. While a tenable argument to this effect might have been made twenty or even thirty years ago, it simply does not conform to the 1982 concept of the powers and responsibilities of federal courts.

There are a number of other cases from around the country upholding §1983 jurisdiction over state professional license litigation. Because the underlying law of each state can be a substantial factor, the cases are only illustrative of the point in hand. We cite them for the purpose of

dispelling any notion that §1983 jurisdiction has been limited to the State Bar of Texas. *Taylor v. Bar,* 424 F.2d 478 (6-KY 70); *Webster v. Wofford,* 321 FS 1259 (3 Judge NDGA 70); *DaVita v. Sills,* 422 F.2d 1172 (3-NJ 70); *Lipman v. Van Zant,* 329 FS 391 (NDMS 71); *Getty v. Reed,* 547 F.2d 971 (6-KY 77); *Erdmann v. Stevens,* 458 F.2d 1205 (2-NY 72) and *Niles v. Lowe,* 407 FS 132 (3-Judge DCHI 76).

In *Getty v. Reed,* 413 FS 511 (EDKY 76), the District Court dismissed a §1983 action by a disbarred attorney concluding that it had "no jurisdiction" and that certiorari was the exclusive means of review. The Sixth Circuit reversed. *Getty v. Reed,* 544 F.2d 971 (6-KY 77). Held, certiorari to the Supreme Court is not the *exclusive* (emphasis: *exclusive*) means to review state court attorney discipline proceedings. District courts do have jurisdiction thereof under §1983. An earlier Sixth Circuit case to the same effect is *Taylor v. Bar,* supra. *Getty* has now been expressly followed in the Eighth Circuit, *Peterson v. Sheran,* 635 F.2d 1335 (8-MN 80).

> "Appellee's argument seems to be that, because decisions of the highest state court on federal constitutional issues can only be reviewed in the United States Supreme Court, relief from deprivations of constitutional rights in state judicial proceedings is not available under 42 U.S.C. §1983 * * *. We reject this contention. Federal courts have jurisdiction over claims that state judicial proceedings have resulted in deprivations of federal constitutional rights * * *."

The foregoing are primarily the authorities upon which respondent urged the courts below to act. The Court of

Appeals placed its decision on much narrower grounds. Petitioner has no basis to complain as to the narrowness of the Fifth Circuit's ruling.

(5)

The principal thrust of petitioner's second point, as we read it, is to urge that abstention should be made the equivalent of abdication in attorney discipline cases. No authority is submitted for this proposition. It is submitted that petitioner has misapprehended the entire nature of the abstention doctrine:

> "This principle [abstention] does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise * * *." *Harrison v. NAACP*, 360 US 167, 177 (59).

> "Section 1983 was * * * a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century * * *. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative *or judicial*.' * * * This Court long ago recognized that federal injunctive relief against a state court proceeding can, in some circumstances be essential to prevent * * * loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225 (72) (Emphasis supplied).

"Younger is not an abdication of the federal role in protecting citizens from 'official lawlessness.' " *Medrano v. Allee*, 347 FS 605 (3-Judge SD TX 72), *aff'd in part*, 416 US 802 (74).

"The subject matter jurisdiction of the lower federal courts was greatly expanded in the wake of the Civil War. A pervasive sense of nationalism led to enactment of the Civil Rights Act * * * empowering the lower federal courts to determine the constitutionality of actions, taken by persons under color of state law * * *. [With later enactment of federal-question jurisdiction,] the lower federal courts * * * 'became the *primary* and powerful resource for vindicating every right given by the Constitution, the laws and treaties of the United States' ". *Steffel v. Thompson*, 415 US 452, 464 (74).

(6)

Rooker (Ptn. 17-19) would still be controlling as to the facts shown in that case. However, the notion that federal courts lack jurisdiction to examine decisions of the state courts for compliance with the Constitution and laws of the United States had been laid to rest even long before *Rooker* was written. Jurisdiction is synonymous with power. The power to so review state court proceedings springs from the *Fourteenth Amendment*. *Ex parte Royall*, 117 US 241 (1886). The question runs not to the existence of power (jurisdiction) but to the proper exercise thereof. *Rooker* has caused untold confusion by failing to make this distinction plain. In *Supreme Court v. Consumers*,

446 US 719 (80), the notion that *Rooker* was an authority concerning the *jurisdiction* of federal courts was substantially put at rest:

> "* * * We have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question * * *; we have not addressed the question.
>
> "* * * We believe that the Virginia Court and its Chief Justice properly were held liable in their enforcement capacities. [A Virginia statute] gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, *just as other enforcement officers and agencies were.*" (Emphasis supplied).

Consumers in turn was foreshadowed by *O'Shea v. Littleton,* 414 US 488 (74).

(7)

Theard (Ptn. 17-19) is no authority with respect to §1983 jurisdiction over professional license cases. The case *did not* involve §1983. The case *did not* involve any question concerning the jurisdiction of the federal district courts nor the proper exercise of such jurisdiction. The case *did not* involve the validity of any state disbarment proceedings. The case *only* involved the question of procedural due process to be applied by the *federal district courts* in ex-

cluding lawyers from practicing before the *federal district courts.*

As pointed out by petitioner (Ptn. 18), various of the circuits have cited *Theard* in declining to entertain §1983 jurisdiction over attorney discipline cases. However, *Theard* was primarily a makeweight and other grounds were stated. Those other grounds are either inapplicable to the present case or they have been distinguished away.

Mr. Justice Frankfurter's observation that the two judicial systems are "autonomous" is obvious dicta and has been blown out of all proportion. Insofar as we know, all state officials are autonomous. The notion that their autonomy places state boards, police officials, prison officials, medical licensing boards, barber licensing boards and masseuse licensing authorities beyond the reach of §1983 simply will not comport with the 1982 concept of the powers and duties of the federal courts.

(8)

In the wake of *England,* many other professional license cases have been accepted into the district courts under §1983 after those cases had been to the state court. In the case of *Silverman v. Browning,* 414 FS 80 (3-Judge DCCN 76) *aff'd,* 429 U.S. 876 (76), the federal claims had been presented to the state court but the state court did not rule on them. Construing *England,* the three judge court concluded that there are two elements, and two elements only to the *England* test: (1) Whether the state court actually passed upon the federal claims and (2) whether or not such was done at the request of the party seeking to

litigate the same federal claims before the United States District Court.

> "* * * The Court finds that in light of the state court's action in not passing upon the constitutional issues, the plaintiff is not foreclosed from returning to this Court * * *."

Silverman was affirmed by the Supreme Court without opinion. Such affirmance constitutes a ruling upon the merits.

Silverman v. Browning, supra, rebuts the notion that the *England* doctrine has been diluted by loose language in *Huffman v. Pursue*, 420 US 592 (75) or otherwise. We further draw attention to *MT v. US*, 440 US 147 (79) where it was stated:

> "As we held in *England*, the abstention doctrine may not serve as a vehicle of depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions."

It is established that a party forced to litigate in the state court need not even commence federal proceedings until the state action is adversely decided. The only bar to subsequent federal litigation is (1) a state court ruling upon federal issues (2) which was rendered at the request of the party who later brings a §1983 action. *Mack v. Board*, 430 F.2d 862 (5-FL 70); *Lombard v. Board*, 502 F.2d 631 (2-NY 74); *Newman v. Board*, 508 F.2d 277 (2-NY 75); *Graves v. Olgiatti*, 550 F.2d 1327 (2-NY 77); *Board v. Tomanio*, 603 F.2d 255 (2-NY 79), *rvsd oth gds* 446 US 478 (80).

A certiorari petition by the defendant state agency was denied in *FL St. v. Mack,* 401 US 960 (71). The denial has considerable significance because it drew two dissenting opinions; which in turn clearly reflects that a substantial majority of the Court considered the decision of the Court of Appeals to be correct.

CONCLUSION

The petition for a writ of certiorari to review the judgment and opinion of the Fifth Circuit should be denied.

Respectfully submitted,

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